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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000709-001 DT 03/28/2013

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
J. Eaton
Deputy

TAPIAS TUFF ROOF L L C

TAPIAS TUFF ROOF L L C
4026 W BLUEFIELD AVE
GLENDALE AZ 85308

v.

ELAINE EMERY (001)

ELAINE EMERY
1723 W CHERYL DR
PHOENIX AZ 85021

DESERT RIDGE JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2012–018059.

Defendant-Appellant Elaine Emery (Defendant) appeals the Desert Ridge Justice Court's determination that she was responsible for a debt to fix her roof after the general contractor absconded with her funds. Defendant contends the trial court erred. For the reasons stated below, the court affirms the trial court's judgment.

I. FACTUAL BACKGROUND.

Defendant's home was damaged and she hired a licensed contractor—A&R—to handle the repairs to the home. A&R subcontracted with Plaintiff for repairs to the roof of the home.[1] Defendant issued checks to A&R.[2] Defendant testified that the A&R employee she dealt with—Paul McCabe— (1) altered her first check—for $2,000.00—; (2) put his name on the check; and (3) took the funds.[3] At that point, the trial court commented:

[1] Trial transcript, bench trial, May 10, 2012, at p. 4, l. 3–19.
[2] In her appellate memorandum—"Notice of Appeal"— Defendant asserted she issued three checks to A & R and described them as Check 5531 for $750.00; check 5532 for $2,783.45 which Paul McCabe altered; and check 5541 for $2,000.00 which was delivered to—and cashed by—Defendant. Defendant failed to use page or line numbers. Therefore, this Court cannot properly reference Defendant's claims.
[3] Trial transcript, *id*. at p. 4, ll. 21–23.

> Okay, Well, folks, Mr. Tapias, Mr. and Mr. Tapias, Trinidad and Edward, I understand your situation. You did work, you want to get paid. Okay. It doesn't sound like, it sounds like both of you have been victimized by a crook, I mean, forgive me, that's kind of a casual way, not a nice way of saying it, but you both have been victimized by this ele, [sic.] fraud to take money for work that they didn't do and didn't have authority to? [sic.] Has A & R, are they a party to this case?[4]

The trial court continued and stated:

> Well, I don't want to close this. What I would like to do is get you both to be a party in the check fraud case first, okay? Now you both also ought to be a party in the Register of Contractor's case.[5]

The trial court commented that it saw both parties as victims.[6] When asked if she was debating whether she owed Plaintiff the money, Defendant did not challenge the amount.[7]

The trial court inquired about the amount for the roof repair. Plaintiff responded that $6,125 was owed because Plaintiff received a down payment of $2,800.00 plus an additional $225.00.[8] Defendant asserted the contractor signed a change order without her knowledge and increased the amount for the job beyond that which was covered by Defendant's insurance.[9]

The trial court continued the trial until June 14, 2012,[10] and began by asking the status of the Registrar of Contractors complaint. Defendant responded the matter was going to be referred to the ROC legal department and a citation would be issued in the next two to three weeks.[11]

Plaintiff testified the balance owing on the contract was $6,125.00.[12] In defense, Defendant asserted she contacted (1) check enforcement; and (2) the Phoenix Police Department; but did not get any redress.[13] She added she (1) never contracted with Plaintiff; (2) did not sign their contract; and (3) did not sign any change orders or amendments to the contract.[14] She asserted Paul McCabe signed the contract and change orders and "orchestrated everything."[15]

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[4] *Id*. at p. 5, ll. 18–25; p. 6, l.1.
[5] *Id*. at p. 8, ll. 7–10.
[6] *Id*. at p. 8, ll. 22–23; p. 9, l. 1.
[7] *Id*. at p. 9, ll. 23–25; 10, l. 1.
[8] *Id*. at p. 10, ll. 2–11.
[9] *Id*. at p. 10, ll. 15–17.
[10] Trial transcript, bench trial, June 13, 2012.
[11] *Id*. at p. 1, ll. 13–21.
[12] *Id*. at p. 2, ll. 20–21.
[13] *Id*. at p. 3, ll. 13–22.
[14] *Id*. at p. 3, ll. 24–25; p. 4, ll. 1–2.
[15] *Id*. at p. 4, ll. 1–6; and ll. 15–19.

Defendant stated the insurance company issued a check to her. She wrote a check to A&R Remodeling and Paul McCabe altered the check to his personal name and cashed the check.[16] She added she (1) contacted the Police Department; (2) contacted the Corporation Commission; and (3) was trying to get a civil default judgment.[17]

The trial court stated the problem the court had was that the court had no right to enrich one party at the expense of another and Defendant admitted Plaintiff had installed a new roof at her home.[18] Defendant stated the amount of the contract exceeded her insurance amount.[19] Defendant added her insurance company was withholding payment of some of her funds because the general contractor had not completed the repairs.[20]

In ruling on this matter, the trial court stated:

> Well, Ms. Emery I will include this in the file, but I think that at this point in life has to enter into a judgment regarding this suit from Tapias Roof, Tough Roof regarding the unpaid invoice.[Sic.] I have taken note of your complaint with the Registrar of Contractors as that, as I'm sure you're going to continue to pursue recovery of that in, in making you whole. It is the opinion of this Court that the purpose of this trial is to address the complaint by the subcontractor who did in fact install the roof at West Cheryl. And ma'am, I have to share with you that you did submit as your evidence the Tapias Tough Roof's invoice. Now I guess you wanted to show me that you hadn't signed and that it had been signed by Mr. McCabe.[21]

The trial court continued and said:

> But ma'am you did submit that as evidence in this case. That does substantiate the testimony that we received from Trinidad regarding this matter. And it does reflect $2,800 deposit which they have acknowledge [sic.] that they did receive.[22]

The trial court granted Plaintiff judgment for $6,000.00. Defendant filed a timely appeal. Plaintiff Tapias Tuff Roof LLC. failed to file a responsive memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

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[16] *Id*. at p. 5, ll. 24–25; p. 6, ll. 1.
[17] *Id*. at p. 6, ll. 1–16.
[18] *Id*. at p. 6, ll. 17–22.
[19] *Id*. at p. 6, ll. 23–25.
[20] *Id*. at p. 7, ll. 17–22.
[21] *Id*. at p. 9, ll. 7–19.
[22] *Id*. at p. 9, ll. 21–24; p. 10, l. 1.

II. ISSUES:

A. Did Defendant Properly Present Her Issues On Appeal.

Defendant submitted a memorandum that omitted (1) citing to the record and (2) relevant authority. Accordingly, Defendant's appellate memorandum fails to comply with Rule 8(a)(3), Super. Ct. R. App. P.—Civil, (SCRAP—Civ.) which states:

> Memoranda shall include a short statement of the facts with reference to the record, a concise argument setting forth the legal issues presented with citation of authority, and a conclusion stating the precise remedy sought on appeal.

When a litigant fails to include citations to the record in an appellate brief, the court may disregard that party's unsupported factual narrative and draw the facts from the opposing party's properly-documented brief and the record on appeal. *Arizona D.E.S. v. Redlon*, 215 Ariz. 13, ¶ 2, 156 P.3d 430, 432, ¶ 2 (Ct. App. 2007). Allegations that lack specific references to the record do not warrant consideration on appeal absent fundamental error, *State v. Cookus*, 115 Ariz. 99, 104, 563 P.2d 898, 903 (1977), which is rarely found in civil cases. *Monica C. v. Arizona D.E.S.*, 211 Ariz. 89, ¶¶ 23–25, 118 P.3d 37, 42, ¶¶ 23–25 (Ct. App. 2005).[23]

Defendant provided no legal support for her assertions. Merely mentioning a claim is insufficient. "In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim." *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). The appellate court is "not required to assume the duties of an advocate and search voluminous records and exhibits to substantiate a party's claim," *Adams v. Valley National Bank*, 139 Ariz. 340, 343, 678 P.2d 525, 528 (Ct. App. 1984).

On the other hand, SCRAP—Civ. Rule 8(a)(5) provides the Superior Court may "modify or waive the requirements of this rule to insure a fair and just determination of the appeal." Although Plaintiff's brief is inadequate, this Court concludes that—in order to insure a fair and just determination of the appeal—this Court will waive strict compliance with SCRAP—Civ. Rule 8(a)(3).

B. Is Defendant Responsible For Paying The Subcontractor On An Unjust Enrichment Theory Where She Had Paid The General Contractor.

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[23] Courts apply the fundamental error doctrine sparingly. Fundamental error goes to the case's very foundation that prevents a party from receiving a fair trial. *State v. Henderson*, 210 Ariz. 561, ¶19, 567, 115 P.3d 601, 607 ¶ 19 (2005).

This case balances the rights of two innocent parties: the homeowner and the subcontractor where the general contractor has been paid but failed to pay the subcontractor. Here, Defendant—after receiving her insurance reimbursement—paid the general contractor (A&R) by issuing checks to an A&R employee—Paul McCabe. Mr. McCabe cashed the check and A&R failed to pay Plaintiff for most of the roof repair Plaintiff performed on Defendant's home. At the time of trial, Defendant had been unsuccessful in receiving any redress from the general contractor, the Police Department, or the Registrar of Contractors. Defendant was left with a Plaintiff's claim for repairs but no insurance proceeds with which to pay the claim.

Following trial, the trial court stated both parties were victims but ruled Defendant would be responsible for reimbursing Plaintiff based on a theory of unjust enrichment. The standard for determining if unjust enrichment occurred was expressed in *Pyeatte v. Pyeatte*, 135 Ariz. 346, 352, 661 P.2d 196, 202 (Ct. App. 1982) where the Court of Appeals held:

> In order to be granted restitution, appellee must demonstrate that appellant received a benefit, that by receipt of that benefit he was unjustly enriched at her expense, and that the circumstances were such that in good conscience appellant should make compensation. *John A. Artukovich & Sons v. Reliance Truck Co.*, 126 Ariz. 246, 614 P.2d 327 (1980); *Restatement of Restitution* § 1 at 13 (1937).

The *Pyeatte*, *id.*, decision clarified the basis for restitution for unjust enrichment. The Court of Appeals held:

> Restitution is available to a party to an agreement where he performs services for the other believing there is a binding contract.

Pyeatte v. Pyeatte, id., 135 Ariz. at 352, 661 P.2d at 202. Consequently, the first issue this Court must address is whether Plaintiff believed there was a binding contract with Defendant. Plaintiff—and Defendant—agreed Plaintiff had a contract that A & R executed. Defendant was a beneficiary of the contract. However, she was not a party to the contract as she did not participate in the negotiation of the contract and never signed it. Indeed, Defendant steadfastly asserted she had no contact with Plaintiff et al. and did not know who they were until she was sued.

In discussing restitution, the Court of Appeals held that to receive relief a party must demonstrate that the adverse party received a benefit and was unjustly enriched at the expense of the first party. The salient adjective is "unjustly". As the Court of Appeals stated in *Pyeatte v. Pyeatte, id.*, 135 Ariz. at 353, 661 P.2d at 203:

> The mere fact that one party confers a benefit on another, however, is not of itself sufficient to require the other to make restitution. Retention of the benefit must be unjust.

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Here, Plaintiff conferred a benefit—a new roof. However, Defendant partly paid for the roof by issuing checks to the general contractor. In *Advance Leasing & Crane Co., Inc. v. Del E. Webb Corp*., 117 Ariz. 451, 573 P.2d 525 ((Ct. App. 1977) our Court of Appeals confronted a situation where a crane lessor who contracted with the general contractor hired a second crane lessor because the first crane lessor did not have a sufficiently large crane. Although the general contractor paid the first crane lessor, the first crane lessor did not fully compensate the second crane lessor. The second crane lessor sued the general contractor, claiming unjust enrichment. The Court of Appeals held the equitable remedies of quantum meruit and unjust enrichment did not apply. The Court of Appeals held:

> Webb gave consideration for the benefit received and thereby was not unjustly enriched.

Advance Leasing & Crane Co., Inc. v. Del E. Webb Corp,. id., 117 Ariz. at 453, 573 P.2d at 527. However, in *Advance Leasing & Crane Co., Inc. v. Del E. Webb Corp., id*., the general contractor was paid in full. Here, Defendant only paid a portion of the subcontractor's bill. In *A M Leasing Ltd. v. Baker*, 163 Ariz. 194, 199, 786 P.2d 1045, 1050 (Ct. App. 1989) the Arizona Court of Appeals stated:

> In reversing the trial court's entry of summary judgment in favor of Radisson, the supreme court acknowledged the distinction, drawn earlier by this court in *Commercial Cornice*, 154 Ariz. at 39, 739 P.2d at 1356, between cases where the owner retained a benefit for which it had paid no one and cases such as *Stratton* and *Advance Leasing*, where "the owner had fully paid the general contractor, and thus was not unjustly enriched." 160 Ariz. at 226, 772 P.2d at 580.

Similarly, in *Wang Elec. Inc. v. Smoke Tree Resort, LLC*., 230 Ariz. 314, ¶ 12, 283 P.3d 45, 49–50, ¶ 12 (Ct. App. 2012) the Court of Appeals held:

> The subcontractors rely on authority addressing situations in which a subcontractor is not paid for labor and materials by a general contractor, and payment is sought from the owner under a theory of unjust enrichment. These cases fall into two categories: ones in which the owner has fully paid the general contractor and ones in which the owner has not fully paid the general contractor. Our courts have held that recovery under a theory of unjust enrichment is not available in the former category, because the owner is not unjustly enriched if it fully paid its obligation. *A M Leasing Ltd. v. Baker*, 163 Ariz. 194, 198–99, 786 P.2d 1045, 1049–50 (App.1989); *Stratton v. Inspiration Consol. Copper Co.*, 140 Ariz. 528, 530–31, 683 P.2d 327, 329–30 (App.1984); *Advance Leasing & Crane Co. v. Del E. Webb Corp.*, 117 Ariz. 451, 453, 573 P.2d 525, 527 (App.1977). But when the owner has failed to fully pay its obligation, our courts have held that recovery for unjust enrichment is available because permitting the owner to retain the benefit without fully paying for it would be unjust.

As stated, Defendant only paid a portion of the cost for the benefit she received.[24] Defendant agreed she paid the general contractor $2,800.00[25] but argued (1) her insurance proceeds were to repair additional damages to the home and not just the roof; (2) the general contractor agreed to a price in excess of her insurance proceeds; and (3) she did not agree to the extra expenses. In ruling, the trial court gave Defendant credit for the $2,800.00 she paid for the roof and awarded Plaintiff the difference between the amount billed and the remaining balance.[26] Consequently Defendant was not ordered to pay twice for the benefit she received. Instead, she was ordered to pay the total price for the benefit[27] and the trial court determined—as stated in *Wang Elec. Inc. v. Smoke Tree Resort, LLC*., *id.*, 230 Ariz. 314, ¶ 12, 283 P.3d 45, 49–50, ¶ 12—"recovery for unjust enrichment is available because permitting the owner to retain the benefit without fully paying for it would be unjust."

C. May Defendant Introduce New Evidence That the Roof Was Not Properly Repaired.

On appeal, Defendant attempted— in the form of her Affidavit—to introduce a new claim that the roof was improperly repaired and "coming apart". She alleged:

> In fact, since the conclusion of both of the subject trials, there is evidence the roof was not repaired properly and is "coming apart". [See Attached Affidavit of Defendant] [Sic.]

Defendant cannot introduce new claims on appeal. Absent due process errors, a party cannot raise an issue for the first time on appeal. *State v. Gatliff*, 209 Ariz. 362, 364, ¶ 9, 102 P.3d 981, 984, ¶ 9 (Ct. App. 2004); *Romero v. SW Ambulance*, 211 Ariz. 200, 203–04, ¶ 6, 119 P.3d 467, 470–71, ¶ 6 (Ct. App. 2005) "The only objection which may be raised on appeal ... is that made at trial." In *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991) the Arizona Supreme Court stated:

> Absent a finding of fundamental error, failure to raise an issue at trial, including failure to request a jury instruction, waives the right to raise the issue on appeal.

Defendant's new allegation is not a due process claim. Therefore Defendant is precluded from raising this claim for the first time on appeal and Defendant's claim fails.

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[24] Although Defendant did not pay in full, her testimony indicated she paid a portion of the charges to the general contractor.

[25] Defendant did not clearly articulate—either at trial or on appeal—if she was arguing the two additional checks—for $750.00 and $2783.45 were attributable to Plaintiff. Because Defendant failed to articulate this point at trial, she is foreclosed from raising it on appeal. *State v. Gatliff*, 209 Ariz. 362, 364, ¶ 9 102, P.3d 981, 983 ¶ 9 (Ct. App. 2004). However, the total of the three checks is below the amount billed for the roof and the $750.00 check—by Defendant's own statement—was to be used for permits.

[26] Defendant failed to challenge the amount for the roof repair during the May 10, 2012, trial/hearing.

[27] This Court recognizes Defendant argued she did not agree to the total charge for the roof. However, she did not properly raise any issue about the value of the work at trial and is foreclosed from so doing on appeal.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Desert Ridge Justice Court did not err in awarding Plaintiff damages based on unjust enrichment where Defendant had paid the general contractor less than the full price for the work.

IT IS THEREFORE ORDERED affirming the judgment of the Desert Ridge Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Desert Ridge Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court

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